Subsections (1) and (2) of s 56 of the Industrial Relations Act read as follows:

> 56(1) Any complaint that any term of any award or of any collective agreement which has been taken cognizance of by the Court has not been complied with may be lodged with the Court in writing by any trade union or person bound by such award or agreement.
>
> (2) The Court may, upon receipt of the complaint, –
> (a) make an order directing any party –
> (i) to comply with any term of the award or collective agreement; or
> (ii) to cease or desist from doing any act in contravention of any term of the award or collective agreement;
> (b) make such order as it deems fit to make proper rectification or restitution for any contravention or any term of such award or collective agreement; or
> (c) make such order as it considers desirable to vary or set aside upon special circumstances any term of the award or collective agreement.

In making its order the Industrial Court stated as follows:

> Article 30(a) of the agreement provides for payment of annual bonus at the *end of each calendar year*. It does not require the employees must complete the year's service before the annual bonus is payable. In fact, it is the action of the company in retrenching its employees that prevented them from completing their year's service. Looking at art 30(c), new employees are given proportionate bonus based on their *completed months of service and part thereof*. Not only completed months attract proportionate bonus but also part of the month. By clear implication, we hold that the retrenched workers are entitled to bonus under art 30 for *completed months of service and part thereof*; payment to be made within one (1) month from date hereof.

It appears to us that art 30(a) is ambiguous, but in our view it was open to the Industrial Court to interpret it by analogy to art 30(c) as it did, and by adopting such interpretation it cannot be said that the Industrial Court acted beyond its jurisdiction. It had the jurisdiction to interpret the collective agreement, either correctly or wrongly. As regards the contention that the Industrial Court had interpreted wrongly and had thereby varied the terms of the collective agreement, we find that the Industrial Court had the power to make such variation under s 56(2)(c) if it considered such variation desirable. Apparently in the opinion of the Industrial Court it was desirable to maintain consistency with art 30(c) in considering whether the retrenched employees should be paid the claimed bonus.

We allow the appeal and order that the Industrial Court's order be restored. Costs to the appellant union here and in the High Court. Deposit should be refunded to the appellant union.

Appeal allowed.

Solicitors: *Aziz Abdullah & Co*; *Xavier & Chandran*.

Reported by *Prof Ahmad Ibrahim*

Fira Development Sdn Bhd v Goldwin Sdn Bhd

SUPREME COURT (KUALA LUMPUR) – SUPREME COURT CIVIL APPEAL NO 173 OF 1987
LEE HUN HOE CJ (BORNEO), MOHAMED AZMI AND WAN HAMZAH SCJJ
9 FEBRUARY AND 26 OCTOBER 1988

Civil Procedure – Judgment in default – Application to set aside judgment – Delay in filing petition – Merits of case not considered by trial judge

In this case the respondents had agreed to build houses for the appellants. The respondents erected and completed the houses. The respondents claimed that the appellants owed them $135,964.22 being the balance unpaid and interest. The appellants gave the respondents three cheques totalling $25,000 but these were dishonoured. The respondents brought an action against the appellants and as no appearance was entered it obtained judgment in default. The appellants thereupon sought leave to enter appearance and to set aside the judgment in default and to stay execution. The application was dismissed by the learned judge of the High Court since he held that the appellants were not able to satisfy the court with the reason for the delay in making the application and the reason for the failure to enter appearance. He stated that it was not necessary for him to consider the merits of the case. The appellant appealed.

Held, allowing the appeal:

(1) Where an application is made for setting aside a judgment in default the learned judge would have to consider the merits of the case.

(2) Where judgment is entered on the failure of a defendant to take any of the procedural steps laid down under the Rules of the High Court 1980, the court has an absolute discretion to set aside the judgment on terms and allow the case to be heard on the merits.

(3) As to delay there is no rigid rule that an applicant must satisfy the court that there is a reasonable explanation only when judgment was allowed to go by default. Obviously the reason, if any, for allowing the judgment and thereafter applying to set it aside is one of the matters to which the court will have regard in exercising its discretion.

(4) The application should clearly be made promptly and within a reasonable time. But the court will in a fit case disregard lapse of time.

Cases referred to

1 *Evans* v *Bartlam* [1937] AC 473 (folld)
2 *White* v *Weston* [1968] 2 QB 647 (refd)
3 *L Oppenheim & Co* v *Mahomed Haneef* [1922] 1 AC 482 (refd)
4 *Beale* v *Macgregor* (1886) 2 TLR 311 (refd)

Appeal from: Civil Suit No 1857 of 1985 (High Court, Ipoh)

Darshan Singh for the appellants.
Roshan Kumar for the respondents.

Cur Adv Vult

Lee Hun Hoe CJ (Borneo) (delivering the judgment of the court): We allowed the appeal with costs here and the court below. We stated we would give our reasons later. We do so now.

On 11 June 1982 the plaintiffs and the defendants entered into an agreement whereby the plaintiffs agreed to build for the defendants 26 units of double-storey terrace houses and 29 units of single-storey terrace houses in Lot No 3405 at Mukim of Assam Kumbong, Perak for $1,762,000. The plaintiffs erected and completed all the houses. The plaintiffs alleged as follows. On 3 July 1985 the parties agreed that the defendants would pay the plaintiffs interest on the balance still remaining unpaid from 1 November 1983 at 1.5% per month until payment in full of the balance. The plaintiffs claimed that the defendants owed $135,964.22 being balance of contract price and interest. In part payment of the above sum the defendants gave the plaintiffs three cheques totalling $25,000. These cheques when presented were dishonoured. The plaintiffs sued the defendants. The summons were said to be served on the defendants on 8 November 1985. No appearance having been entered by the defendants the plaintiffs went on to obtain judgment in default on 7 January 1986. By summons in chambers dated 21 March 1986 the defendants sought leave to enter appearance and to set aside the judgment in default and to stay execution.

On 23 October 1987, the learned judge dismissed the application with costs. The defendants contended that the service was bad, hence they did not enter appearance. They also explained that the delay in filing of the application was because the parties were negotiating a settlement. All these were rejected by the learned judge. However, the learned judge stated that it was not necessary for him to consider the merits of the case, if any, since the defendants were not able to satisfy the court with the reason for the delay in making this application and the reason for the failure to enter appearance.

We are unable to agree with the reasoning of the learned judge. First, where an application is made for setting aside a judgment in default the learned judge would have to consider the merits of the case.

The defendants alleged as follows. There were disputed issues between the parties. Hence they tried to settle these by negotiation. The completion date of the project was 15 September 1982. But, because of delay on the plaintiffs' part in completing the project the defendants had to pay $81,201.46 to over 30 purchasers. Also, the defendants had to pay $150,000 for defects in the scheme which the plaintiffs failed to remedy. The defendants claimed to have a good defence and a good counterclaim.

Where judgment is entered on the failure of a defendant to take any of the procedural steps laid down under the Rules of the High Court 1980, the court has an absolute discretion to set aside the judgment, if necessary, on terms and allow the case to be heard on the merits. Lord Atkin stated clearly the principles in which the court should act in *Evans* v *Bartlam*[1] in these words:

> ... The principle obviously is that unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure.

In the instant case the learned judge did not consider the judgment to be irregular. *Mallal's Supreme Court Practice*, 2nd Ed, Vol I at p 84 explains the position where the judgment is regular thus:

> The discretion will only be exercised if the affidavit supporting the application to set aside discloses facts showing a defence on the merits; or for some very sufficient reason: *Bank Bumiputra Malaysia Bhd* v *Majlis Amanah Ra'ayat* [1979] 1 MLJ 23; *Farden* v *Richter* (1889) 23 QBD 124.

A defence on the merits means merely raising only an arguable or triable issue, eg contributory negligence in a running down case in *White* v *Weston*.[2] A judgment in default is not a judgment on the merits: *L Oppenheim & Co* v *Mahomed Haneef*.[3]

As to delay there is no rigid rule that an applicant must satisfy the court that there is a reasonable explanation only when judgment was allowed to go by default. Obviously, the reason, if any, for allowing the judgment and thereafter applying to set it aside is one of the matters to which the court will have regard in exercising its discretion. Clearly, the application should be made promptly and within a reasonable time. But the court will in a fit case disregard lapse of time: *Beale* v *MacGregor*.[4]

Appeal allowed.

Solicitors: *Darshan Singh & Co*; *Ng Yook Woon*; *Andrew TC Saw & Co.*

Reported by *Prof Ahmad Ibrahim*